IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 17.07.2007

Coram :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

and

THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Tax Case Appeal No.472 of 2007

T.Jayabharathy Appellant / Appellant.

v.

The Assistant Commissioner of
Income Tax,
Central Circle II(1) Respondent / Respondent.

Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai Bench 'B' dated 06.01.2006 in M.P. No.76/Mds/2005 in T.T. (SS) A.Nos.23/Mds/1996 against the Order of the Assistant Commissioner for Income tax Central Circle II[1] Chennai for the Assessment year of 1985 to 1995 in GIR No.72-C dated 28.11.96 respectively.

For Appellants : Mr.V.Ramachandran,
Senior Counsel for
Mrs.Anitha Sumanth

JUDGMENT

(Judgment of the Court was delivered
by K.RAVIRAJA PANDIAN, J.)

The substantial questions of law formulated for consideration in this appeal are as follows:

"1. Whether on the facts and in the circumstances of the case the Tribunal is right in law in confirming the additions pertaining to the balances in the Indian Bank?

2. Whether on the facts and in the circumstances of the case he Tribunal is right in law in not having posted the appeal for hearing and giving the appellant due notice of the same subsequent to the hearing of the miscellaneous petition filed by the appellant?

3. Whether on the facts and in the circumstances of the case the Tribunal is right in law in passing the impugned order on the

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

merits of the case in gross violation of the principles of natural justice?"

2. The appellant/assessee filed an application in IT (SS) No.23 (MDS)/ 1996 under section 254(2) of the Income Tax Act, 1961 for the block assessment years 1986-87 to 1996-97 which has been heard and decided by the Tribunal on 21.09.2004. The same is put in issue in this appeal.

3. The statement of facts, as culled out from the appeal memorandum is as follows :

An assessment has been framed on the appellant/assessee pursuant to the search conducted in the assessee's residence on 23.07.1995. The Assistant Commissioner of Income Tax, Central Circle, Chennai by order dated 28.11.1996 determined the total undisclosed income by making certain additions. That assessment was challenged before the Tribunal questioning the correctness in respect of three additions. The Tribunal passed an order dated 21.09.2004 allowing the appeals pertaining to additions Nos.1 and 2, however, did not deal with the third addition. As the non consideration of the third addition was regarded as an error apparent on the face of the record, the assessee filed a petition under section 254(2) of the Income Tax Act, 1961 for reconsideration of the issue. The Tribunal entertained the application and upon hearing the counsel on either side on that application, decided the issue against the assessee.

4. The correctness of the said order is now canvassed in this appeal by contending that when the Tribunal, admitted that the third addition which was also one of the items of dispute in the appeal, has not been considered and which requires reconsideration, would have given an opportunity to the assessee for production of factual materials available to sustain its case. Without doing so, the Tribunal took a curious decision to decide the issue on the basis of the letter dated 20.11.1996 stated to be filed by the assessee. There is absolutely no detriment on the part of the Tribunal if an opportunity is given to the assessee to argue the issue on merits, by reopening the earlier order dated 21.09.2004. As the issue in dispute is in a narrow campus, when the matter was argued for admission, this Court issued notice to the counsel for the revenue and heard both sides today.

5. Learned counsel for the revenue sought to sustain the order on the ground that the relief sought for in the miscellaneous petition was only for consideration of the issue raised in the petition pertaining to the deposit in three branches of the Indian Bank. While deciding the miscellaneous petition an opportunity was given to the assessee. The relief sought for in the miscellaneous petition was not for recalling the order dated 21.09.2004. Hence, there cannot be any exception to the order passed by the Tribunal in disposing of the issue in dispute while considering the miscellaneous application.

6. Heard the learned counsel on either side and perused the materials available on record.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

7. It is a fact and there is no dispute that the Tribunal failed to consider the third addition when the order was passed by the Tribunal on 21.09.2004 in the appeal filed by the assessee. Non consideration of the one of the disputed issues by the Tribunal in the appeal before it was regarded as a mistake apparent on the face of the record and on that basis the assessee was compelled to file an application under Section 254(2) of the Income Tax Act for rectification of mistakes. Whether there is a mistake apparent on the face of the record was the only the question in the miscellaneous petition filed by the assessee. It is also an undisputed fact that the miscellaneous petition was entertained by the Tribunal and thereby it is evident that there was an error apparent on the face of the record in the order made by the Tribunal on 21.09.2004.

8. While allowing the assessee to establish its stand whether there exists an apparent mistake in the order passed by the Tribunal, the Tribunal can expect the assessee only to establish the point to that effect, but cannot expect to argue on the issue which the Tribunal failed to decide while passing the orders on the appeal on 21.09.2004. In order to establish its case that the third addition is also uncalled for, the assessee may require to produce materials, which are factual in nature. The Tribunal, as an ultimate fact finding authority cannot shut the door at the threshold by directing the assessee to argue on the fact in issue while making arguments in respect of an application under section 254(2) of the Act. No prejudice would be caused to the Tribunal if an opportunity is given to the assessee to adduce materials to establish its case on merits. The opportunity to be given to the assessee should be a real and reasonable opportunity and not an opportunity given for namesake. There is no apparent reason whatsoever for the Tribunal to hurriedly decide the issue which was left out in the main appeal, while deciding the miscellaneous petition itself. Not only natural justice, but also a fair play demands that the petitioner should be given a real opportunity to establish its case. Further more, if the assessee is not allowed to establish its case before the Tribunal on factual issue, it cannot raise any issue which are factual in nature as per the statutory provisions before the appellate forum.

9. Taking into consideration of the over all circumstances of the case, we are of the view that the way in which the third issue has been dealt with by the Tribunal at the stage of deciding the miscellaneous petition itself, cannot be regarded as a correct approach. The appellant/assessee should have been given an opportunity to put forth its case in respect of the third issue which has been left out for consideration in the original order passed by the Tribunal by giving due opportunity. Hence, the impugned order in the appeal is set aside and the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

matter is remitted back to the Tribunal to reconsider the issue afresh after giving due opportunity to the appellant/assessee.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

mf

To
1.The Asst.Registrar, Income-tax
Appellate Tribunal, III Floor
Rajaji Bhavan, Besant Nagar,
Madras 90.
2.The Asst.Commissioner of Income-tax
Central Circle II(1) Chennai

+ 1 CC To Mrs.Pushya Sitarman, Advocate SR NO.43623

+ 1 CC To Ms.Anita Sumanth, Advocate SR NO.43561

T.C.(A) No.472 of 2007

nsm[co]
gp/6.8.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/